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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 496.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

against

ERNEST BROOKS, HAROLD WILSON BROOKS, and WALTER DOUGLAS BROOKS, as Executors of the Will of ERNEST AUGUSTUS BROOKS.

BRIEF BY SELDEN BACON AS *AMICUS CURIAE.*

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Amicus Curiae.

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If the Statute Were to Be Construed as Claimed by the Government, Enforcement of the Provisions for Taxing Bonds Belonging to a Friendly Alien Non-Resident Decedent, Merely Because the Bonds Were an Obligation of a Domestic Corporation and Physically Present Here, Would Be Unconstitutional.

As pointed out by Judge Learned Hand in his concurring opinion, it does not seem possible to distinguish the following recent decisions of this Court on the limits of governmental jurisdiction, for purposes of taxation, of sovereign States of this Union.

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204;
Baldwin v. *Missouri*, 281 U. S. 586;
Buck v. *Beach*, 206 U. S. 392;
Blodgett v. *Silbermann*, 277 U. S. 1.

The sovereign *jurisdiction* of an American State to impose taxes within the scope of its territorial jurisdiction is, except as limited by the Federal Constitution, no more limited than that of any other sovereignty.

The *power* of an American State to exercise that jurisdiction has been directly limited, however, by two provisions of the United States Constitution.

> "No State shall, without the consent of Congress, lay "any Imposts or Duties on Exports or Imports."
>
> "No State shall, without the consent of Congress, lay "any duty of tonnage."
>
> Const. Art. I, Sec. 10.

And impliedly, under the Constitution, a State Government can no more tax the exercise of the sovereign functions of the Federal Government than the Federal Government can tax the exercise by the State Government of its functions.

> *The Collector* v. *Day*, 11 Wall. 113, 126-128;
> *Dobbins* v. *Erie County*, 16 Pet. 435.

None of these restrictions has the slightest application to an inheritance or estate tax, by whatever name it be called.

The estate or transfer tax, although in strictness a tax on the transfer, is, in its essence, analogous to a tax on property, as distinguished from a tax on persons or on business.

> "The principle that the subject to be taxed must be "within the jurisdiction of the State applies as well in "the case of a transfer tax as in that of a property tax."
>
> *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, 80.

No one of the restrictions above-mentioned was in any way made the basis of the decisions of this Court in the first four cases cited above. Each of them proceeded on the limitations of jurisdiction for purposes of taxation common to all sov-

ereign powers, or at most on the restrictions contained in the next to the last clause of Section 1 of the XIV Amendment.

But the States are no more limited in their powers of taxation by the next to the last clause of Section 1 of the XIV Amendment than is the United States by the identical words used in the last two clauses of the V Amendment.

Heiner v. *Donnan*, 285 U. S. 312 S. C. 76 L. C. Ed., 501, 506;
Coolidge v. *Long*, 282 U. S. 582, 596.

And the provisions of the V Amendment to the Constitution are a protection to the alien friend equally with the citizen.

Russian Fleet v. *United States*, 282 U. S., 481, 489;
Wong Wing v. *United States*, 163 U. S., 228, 238.

It follows that none of these decisions on the taxing powers of the States can be differentiated from the case at bar on any theory that the United States Government has a broader jurisdiction to impose taxes within *its* territorial limits, than a State has within *its* territorial limits.

The inherent weakness of the ruling in *Blackstone* v. *Miller* (188 U. S. 189), and the cause of its being finally overruled, was due entirely to an element, common to all sovereign powers, in cases of taxation of property as such or of its transfer, viz.: That the property sought to be taxed *must* itself be within the territorial limits of the taxing sovereign. And when this court definitely decided that bonds were not the property themselves, but only evidences of the property, and were consequently within the scope of the doctrine *mobilia sequuntur personam* (277 U. S. 1, 14-16), the reversal of the rule in *Blackstone* v. *Miller* was inevitable.

Counsel for the government, in the Court below, quoted at some length from the opinion of this court in *United States* v. *Bennett*, 232 U. S. 299, as supposedly supporting their doctrine, of inapplicability of this territorial limitation of tax-

ing sovereignty to the United States. But they omitted to notice that the taxing power of the United States over property or its transfer was in that opinion expressly declared to be "co-extensive with the limits of the United States". In other words, that decision itself mentioned the existence of the precise limitation which we invoke, and which counsel for the government seek to ignore.

It is no more possible for the United States to bring property within the limits of the United States by a fiction so as to confer on itself sovereignty to tax it, than it is for a State to do so. Fictions no more confer sovereignty than they do jurisdiction. And no sovereign differs from any other in possessing such a power.

> "The power of taxation, however vast in its character "and searching in its extent, is necessarily limited to "subjects within the jurisdiction of the State. These "subjects are persons, property and business. Whatever "form taxation may assume, whether as duties, imposts, "excises or licenses, it must relate to one of these sub-"jects."
>
> State Tax on Foreign Held Bonds, 15 Wall. 300.

If the several States lack that power over foreign-owned bonds, because the property sought to be taxed is not within *their* respective territorial limits, the Federal Government equally lacks it when similar property sought to be taxed is not within *its* territorial limits. Both State and Nation are sovereign powers. Both exercise their sovereign powers of taxation of property only within their respective territorial limits, and both under the fundamental identical limitations imposed by the Fifth and Fourteenth Amendments.

This doctrine of taxation of property is in no degree affected by the fact that the Government may impose a tax on an absent citizen as such. So may a State. That jurisdiction to tax rests on the citizenship in each case. But power to impose *estate taxes* has no such basis in mere citizenship, and necessarily rests on the situs of the property

itself (270 U. S. 69, 80). That situs cannot be adjudicated on different principles to suit the convenience or desires of particular governments.

Moreover, the case of the estate of a non-resident friendly alien not in business here presents no opportunity for a tax predicated on citizenship, on residence or on business.

It follows that the statute, if construed so as to include property not within the territorial limits of taxing sovereignty of the United States, becomes *ipso facto* ineffective and void. A construction of an Act of Congress that leads to such a result is rejected whenever possible.

> *Russian Fleet* v. *United States*, 282 U. S., 481, 491;
> *Phelps* v. *United States*, 274 U. S., 341.

If the construction of the act adopted below is adopted here the decision below must, of course, be affirmed. If that construction be not adopted, and it is thought that Congress intended to exceed its powers of taxation, the decision below must still be affirmed, for, if construed so as to impose an estate tax on such bonds owned by a non-resident friendly alien decedent, not engaged in business here, the act is unconstitutional.

Respectfully submitted,

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